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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 630

RUTH F. IVES, formerly RUTH F. ISENSTEIN,
Petitioner,

v.

WILLIAM B. FRANKE, Secretary of the Navy,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	2-3
Statement of the Case	4-6
Reasons for Granting the Writ	6-10
Appendix	
Opinion	1a-13a
Judgment	14a

CITATIONS

Cases:

Davis v. *Woodring*, 72 App. D.C. 83, 111 F. 2d 523	7
Greene v. *McElroy*, U.S. Sup. Ct., June 29, 1959	10
Harmon v. *Brucker*, 355 U.S. 579	9, 10

Miscellaneous:

Air Force Regulation No. 39-10, dated March 17, 1959	6
D. O. D. Directive No. 1332.14 dated January 14, 1959	8
Marine Corps Manual, Paragraph 10001	9
Marine Corps Manual, Paragraph 10269	9

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Ruth F. Ives, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on September 17, 1959 and the Order denying rehearing entered on October 13, 1959.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix, pp. 1a through 13a) is not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was first entered on September 17, 1959 and became final on October 13, 1959 when a petition for rehearing was denied. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Does the Secretary of the Navy have the authority to deny an Honorable Discharge to an enlisted woman marine being separated for disability and who has rendered "honest and faithful service" solely upon the ground that her average mark for proficiency was below that prescribed by regulations?

2. Can the Secretary of the Navy establish requirements for obtaining an Honorable Discharge which discriminate against enlisted persons and in favor of officers of the Marine Corps?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Amendment V—No person shall . . . be deprived of life, liberty or property without due process of law; . . .

United States Code

34 U. S. C. 492—Honorable discharges may be granted to all enlisted persons in the Navy. R. S. 1426, June 11, 1896.

10 U. S. C. 6291—Honorable Discharges, in the form prescribed by the Secretary of the Navy, may be granted to enlisted members of the naval service. Aug. 10, 1956, c. 1041, Sec. 1, 70A Stat. 391. Based on R. S. Sec. 1426; Act June 11, 1896, J. Res. 62, 29 Stat. 476—R. S. 1427 (Secs. 192 & 193 of former Title 34).

34 U. S. C. 194—It shall be the duty of every commanding officer of a vessel, on returning from a cruise, and immediately on his arrival in port, to forward to the Secretary of the Navy a list of the names of such of the crew as, in his opinion, on being discharged, are entitled to an "honorable discharge" as a testimonial of fidelity and obedience; and he shall grant the same to the persons so designated. R. S. 1429, Aug. 22, 1912.

34 U. S. C. 105i—(b) The Secretary of the Navy, under such regulations as he may prescribe, may terminate the enlistment of any enlisted woman in the Regular Navy or Marine Corps, and each such person whose enlistment is so terminated shall be discharged from the service. June 12, 1948, c. 449, Title II, Sec. 214, 62 Stat. 370.

10 U. S. C. 6294—The Secretary of the Navy, under regulations prescribed by him, may terminate the enlistment of and discharge any enlisted woman in the Regular Navy or the Regular Marine Corps. Aug. 10, 1956, c. 1041, Sec. 1, 70A Stat. 392. Based on Act June 12, 1948, c. 449 Sec. 214 (less (a)) 62 Stat. 370, Sec. 105i. of former 34.

STATEMENT OF THE CASE

Ruth Ives enlisted in the Women's Branch of the Marine Corps on February 2, 1952. (R. 6). During the next few months, she was assigned to various duties, and in July 1952 was promoted to the grade of Private First Class. (R. 16). Subsequently, she became ill and was hospitalized for a nervous or emotional disorder which was diagnosed to have existed prior to her enlistment. (R. 10). The Board of Medical Survey determined her to be physically disabled for naval service but not as a result of her own misconduct, and recommended that she be discharged from the service. (R. 10). Miss Ives waived her right to a hearing before a Physical Evaluation Board. (R. 14) (to which hearing she was entitled if she wished to contest the recommendation that she be discharged for physical disability) and on October 22, 1952, she was separated from the service administratively because of physical disability. (R. 12, 13). The record does not indicate that she was told that she would receive a General Discharge rather than an Honorable Discharge; in fact, on the Report of Separation from the Armed Forces, which petitioner signed at the time she left the service, the single word "Discharge" appears, (R. 12, item 7) and the reason given is "Disability and Medical Sur(vey)." (R. 12, item 8).

The discharge issued to petitioner was a General Discharge rather than an Honorable Discharge. (R. 2, 20, 24). The sole reason for issuing her this lower grade discharge was that her average mark for *proficiency* was slightly below that required by Marine Corps regulations as a prerequisite for an Honorable Discharge upon being separated for physical disability. (R. 27, 31, 32-33). These regulations require enlisted

persons to excel 40 per cent (40%) of those of the same rank performing the same or similar duties in order to obtain an Honorable Discharge. (R. 15-16, 37). No contention has been made by the respondent nor is there anything in the record to indicate that petitioner at any time failed to devote her best efforts to her duties. Petitioner's average mark for *conduct* more than satisfied the requirements for an Honorable Discharge. (R. 17). Historically, an Honorable Discharge was issued to all persons whose conduct while in service was satisfactory, but in 1945 the Marine Corps embarked upon its policy of withholding Honorable Discharges for lack of proficiency. (R. 45).

Petitioner, after exhausting her administrative remedies, filed suit in the United States District Court for the District of Columbia against the then Secretary of the Navy seeking a declaratory judgment that she was entitled to an Honorable Discharge and a mandatory injunction that she be issued one. (R. 2-4). The jurisdiction of the District Court was based upon Title 11, Sections 305 and 306 of the D. C. Code of Laws, and upon the Declaratory Judgment Act, 28 U. S. Code 2201 and 2202, and on 5 U. S. Code 1000. The District Court granted a motion for summary judgment in favor of the Secretary and the Petitioner appealed to the U. S. Court of Appeals for the District of Columbia Circuit. (R. 42). While the case was pending in that court, the then Secretary, Thomas S. Gates, Jr. resigned and the present Secretary, William B. Franke, was substituted as appellee upon motion of petitioner and order of the court dated August 24, 1959. (R. 52). On September 17, 1959, the Court of Appeals by a two-to-one decision affirmed the judgment of the District Court, Judge Bazelon

dissenting. On October 13, 1959, the Court of Appeals denied a petition for rehearing, and the petitioner now brings this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The substantial federal question involved is whether the Secretary of the Navy has the power, express or implied, to deny an Honorable Discharge to enlisted marine personnel solely on the ground of failure to meet standards of proficiency fixed by him. The majority of the Court below, relying on a statute[1] which is a general authorization to prescribe regulations terminating the enlistment of enlisted women in the Marine Corps, read into this statute the power to include proficiency as a prerequisite to an Honorable Discharge saying, "there is no connotation of dishonor in a General Discharge which expressly recites that it is 'under honorable conditions'".[2] The dissenting opinion, (Bazelon, J.) while conceding that the statute gives the Secretary "discretion" in prescribing regulations respecting discharges, holds that there are limits on that discretion imposed by historical precedent which preclude the Secretary from withholding an Honorable Discharge for lack of proficiency irrespective of the effort exerted by the serviceman. The question is thus posed whether the

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[1] 34 U. S. C. Section 105i(b).

[2] Opinion below, App. p. 3a. But Air Force Regulation No. 39-10, dated March 17, 1959, Paragraph 8 a. states "... *a General Discharge has been found to be a definite disadvantage to an airman seeking civilian employment.*" (Emphasis supplied.)

statute authorizes the Secretary to do what all history and precedent indicates he may not do.[3]

This question has not been but should be decided by this Court because it is a federal question of general and continuing importance to a large segment of the population. The regulations and instructions promulgated by the Secretary of the Navy, presumably under the authority of this statute, automatically prevent 40 per cent of all enlisted marines from obtaining an Honorable Discharge.[4] That a large number of marines are receiving General Discharges is manifest by the figures submitted to the lower court by respondent (appellee below).[5] These large numbers will undoubtedly be increased by virtue of a directive issued by the Department of Defense *after the hearing of this case in the District Court*, which now authorizes *all* three military departments to use the criterion of pro-

[3] See precedents cited in Judge Bazelon's dissenting opinion (App. pp. 7a-8a). Even in the case of *Davis* vs. *Woodring*, 72 App. D. C. 83, 111 F. 2d 523, cited by the majority, there is an indication set forth in footnote 4 that an honorable discharge is to be awarded as a testimonial of honest and faithful service.

[4] These regulations and instructions are found at R. 37 and R. 15-16 respectively. An average mark of 3 in proficiency is required for an Honorable Discharge, and a mark of 5 is given where a marine excels at least 40% and not more than 60% of all other marines of the same rank. Petitioner, despite her emotional and mental difficulties, had a final average mark of 4.25.

[5] See Exhibit 5 to Appellee's memorandum (R. 44-45). In Judge Bazelon's dissenting opinion (App. p. 5a) he indicates that 5,659 marines received General Discharges in the year 1952. Of these, it is not possible to pin-point the number receiving this type discharge through lack of proficiency because, according to appellee, it would be too expensive to provide this information (R. 45).

ficiency in determining entitlement to an Honorable Discharge.[6]

If the lower court's decision is allowed to stand, untold numbers of enlisted men and women who volunteer for or who have been drafted into their country's service and who have rendered "honest and faithful service" can now be branded for life with the stigma[7] of a less than Honorable Discharge merely because of ineptitude, or an "incapacity of nature or circumstances for which the individual is not at fault",[8] and irrespective of the effort exerted or the perfection of conduct of such servicemen and women.[9] Whether the authority to create such a situation has ever been granted by Congress or contemplated by it, or, indeed, could be authorized under the Constitution, is one which should be decided by this Court.

2. Another reason for granting the writ in this case is that this Court should decide the question of whether the Secretary of the Navy has the power to establish proficiency criteria for entitlement to an Honorable Discharge which flagrantly discriminate between officers and enlisted personnel. Under the present regulations, officers may obtain an Honorable Discharge even though their proficiency may be found wanting,

[6] D. O. D. Directive Number 1332.14, dated January 14, 1959, Paragraph VI, A 2.

[7] See footnote 2.

[8] Dissenting opinion below, App. p. 8a.

[9] The effect of the lower court's ruling can be especially severe upon those older servicewomen who, upon reaching the menopause, find their ability to render proficient service severely limited because of their physical condition.

provided that this is not due to a lack of effort on their part.[10] No such allowance is made in the case of enlisted persons.[11] They must either obtain the required grade for proficiency or fail to be awarded an Honorable Discharge, even though their conduct be of the highest order and even though they may have exerted the best efforts of which they are capable. This is a continuing discrimination which works to the disadvantage of enlisted persons. This Court should decide whether there is any foundation in law for such a double standard relating to something as fundamental as the character of a discharge which will be carried over into civilian life and will affect an individual for the rest of his days. This Court has already recognized that the character of a discharge is a right to be protected by law.[12] It should now decide whether this right can be dispensed on an easier standard for commissioned officers than the standard applied to enlisted persons.

[10] Marine Corps Manual, Paragraph 10001, provides for an Honorable Discharge to be issued to an officer who is separated for administrative reasons such as academic failures *despite honest effort*, and personality defects or physical deficiencies *despite which the individual concerned is believed to have performed service to the best of his ability.* (Emphasis supplied.) This paragraph further provides for a General Discharge where the separation is for academic failures *due at least in part to lack of effort*, or for personality defects or physical deficiencies *unaccompanied by a record of performance deemed to represent the best of which the individual is capable.* (Emphasis supplied.) (R. 34-35).

[11] Marine Corps Manual, Paragraph 10269, provides without qualification for an Honorable Discharge for an enlisted person being separated for disability whose minimum final average marks are 3 in proficiency and 4.0 in conduct. (R. 37).

[12] *Harmon* v. *Brucker*, 355 U. S. 579.

3. In holding that the Secretary may condition the award of an Honorable Discharge upon proficiency, in the absence of express language in the statute authorizing him to do so and in the face of historical precedent to the contrary, the lower court is in conflict with the principles announced by this Court in *Greene* v. *McElroy*, *U. S. Sup. Ct.*, June 29, 1959, wherein this Court held that the traditional forms of due process and fair procedure could not be restricted by implication and without the most explicit action by the Nation's lawmakers.[13] In *Harmon* v. *Brucker*, 355 U. S. 579 this Court held that the right to an Honorable Discharge was protected by law, and that the Secretary's action must be measured by the statute authorizing him to act. In the case at bar, the lower court is content to read power into the statute based upon their apparent view that there is no serious disadvantage in receiving a General Discharge rather than an Honorable Discharge, even though the Air Force, at least, recognizes such a disadvantage does exist.[14] This refusal to recognize the rule in *Harmon* is alone sufficient reason for the writ to be granted.

There are thus before this Court for consideration vital questions of far-reaching significance as to the scope and extent of the power of the Secretary of the Navy (and of the other service Secretaries) over the fate and future of enlisted personnel. The need to clarify the contradictions inherent in the decision below, when read against earlier decisions by this Court, and the impact of such conflict on the strength and power of the armed forces all emphasize the urgent need for a resolution of these issues by this Court.

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[13] Slip opinion, p. 33.

[14] See footnote 2.

CONCLUSION

The issues herein involve substantial and important questions of Federal law affecting a large segment of the population which should be decided by this Court.

Respectfully submitted.

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